IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT OF MISSOURI

W.D. NO. WD63399

MICHAEL EDWARD COYLE,
RESPONDENT

vs.

MISSOURI DIRECTOR OF REVENUE,
APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MO
AT PLATTE CITY
SIXTH JUDICIAL CIRCUIT
HONORABLE GARY WITT, JUDGE
DIVISION V

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES/REGULATIONS **PAGE**

JURISDICTIONAL STATEMENT

This case involves an appeal from a Judgment of the Circuit Court of Platte County at Platte City, Missouri wherein the trial court set aside the Appellant Director's decision to administratively sanction Respondent's operating privilege pursuant to the provisions of Section 302.500 *et seq*. At issue is whether there is substantial evidence to support the trial court's judgment.

Platte County lies within the territorial jurisdiction of the Missouri Court of Appeals, Western District. *Sections 477.050 to 477.070,* R.S.Mo. (1996). This appeal does not involve the validity of a treaty or statute of the United States or any statute or provision of the Missouri Constitution, the title to any office of this state, the construction of a revenue law, or the imposition of the death penalty. This appeal is, therefore, within the general appellate jurisdiction of the Missouri Court of Appeals, Western District. Mo Const. Art. V., Section 3 (1945).

STATEMENT OF FACTS

The Datamaster is an evidentiary breath testing device. For more than a decade it has been on the Department of Health and Senior Service's list of approved breath testers. In the late 1990s, National Patent Analytical Systems, the manufacture of the Datamaster, advised the State of Missouri that it was making a change to the unit's internal printer. This change would occasion a change in software as a new printer driver was required. [Tr. 10-12].

When so noticed, the department, primarily Christine Silva, a State Public Health Laboratory Scientist, asked that several other changes be made to the software. [Tr. 12]. As it relates to the issues in this appeal, Ms. Silva asked that the new software direct the unit to utilize a dynamic as opposed to a static sampling process. [Tr. 13].

According to Ms. Silva, sampling in the Datamaster is done through the software. [Tr.. 14]. There are parameters written into the software for the acceptance of a minimum requirements for a sample. [Tr. 14]. Between the breath tube and the sample chamber is a thermistor. [Tr. 14]. The thermistor is a hairlike structure. During the sampling process it is heated to 100 degrees Celsius. [Tr. 14]. When a breath sample is introduced, the air flow causes the thermistor temperature to decrease. [Tr. 14]. At the end of the breath, the breath flow decreases causing the thermistor to reheat. [Tr. 14]. According to Ms. Silva, the unit interprets this change in temperature as the end of the sample. A detector continually monitors the sampling process. When the unit finds that a sufficient sample has been captured, there is a check for interferents. [Tr. 16].

Prior to the change in software, the Datamaster performed dynamic sampling.

Dynamic sampling allowed an individual to continue introducing a sample into the chamber even though the unit had determined that a sufficient sample had be provided and despite the presence of the interferent filter.

With the change in software, sampling was changed to static. Under this process, once the unit had determined that a sufficient sample had been provided, a valve closed prohibiting the introduction of any additional breath. The interferent filter was introduced and the analysis performed. [Tr. 15-16].

The manufacturer incorporated this and other changes into its new software. Despite the manufacturer's representations to the contrary, it took eight separate attempts over eleven months to incorporate these changes into a form approved by Ms. Silva. [Tr. 18].

Ms. Silva checked each separate attempt on a unit kept at the state health laboratory. After the eighth revision, she felt the software submitted satisfied her criteria. Ms. Silva's in house testing was the only testing performed on the software. No other individual, entity or enterprise analyzed the changes. She designed her own approval protocol which was admittedly less than what was required for the actual approval of a unit for use in this state. [Tr. 18, 21].

According to Ms. Silva no portion of this process necessitated compliance with the Administrative Procedures Act as there was no formal rule making involved. It was her position that the unit had not changed and hence no notice, publication or solicitation of public opinion was warranted. [Tr. 29].

The changes, once finalized, were memorialized in a master disk provided Ms. Silva by the manufacturer. She then made two copies. One was given to the Missouri Highway Patrol,

the other to the Safety Center. Each of these entities then made such copies as were necessary to permit distribution to the various law enforcement agencies and units throughout the state. [Tr. 24-25]. No one verified the copies made by Ms. Silva nor was analysis undertaken with respect to any field unit once the software had been installed on that particular unit. The unit used to analyze Mr. Coyle's breath sample was on such untested unit.

According to Corporeal Brenion, Mr. Coyle was arrested at 1:05 a.m. [Tr. 88]. Once under arrest he was placed in the trooper's patrol car. [Tr. 88]. The corporeal then returned to the Coyle vehicle to speak with Ms. Coyle regarding the vehicle and her ability to drive. Concerned over her abilities, he gave her instructions on the use of a portable breath tester and then asked that she provide a sample, which she did. Based upon the result, he told her he would not let her drive. The corporeal then escorted her back to his car.[Tr. 88-89].

Once she was safely inside, he took the keys to the Coyle vehicle and went back to it. He moved it thirty-five to fifty feet away and then secured it. [Tr. 74]. The corporeal spent five to seven minutes dealing with Ms. Coyle and the vehicle while Mr. Coyle sat unattended in his patrol car. [Tr. 74, 81].

Before Mr. Coyle was asked to provide a breath sample on the morning of his arrest, Corporeal Brenion testified that he observed Mr. Coyle for the fifteen minutes immediately preceding the taking of his sample. [Tr. 84]. He kept track of the time with his wrist watch. [Tr. 84]. While his watch didn't necessarily correspond with the time on the breath test printout, he did believe that his watch was accurate. [Tr. 86].When Riverside Officer Archibald last checked the Datamaster prior to Mr. Coyles' arrest, he found the time and date to be

"satisfactory". [L.F. 23].

Coyle testified that beer makes him a little "gassy". [Tr. 76] It always makes him belch or burp and it did so throughout the evening of October 7 and the morning hours of October 8. [Tr. 76].

The Datamaster breath test ticket represents that Mr. Coyle provided a breath sample at 1:22 a.m. seventeen minutes after his arrest. [L.F. 25].

POINTS RELIED UPON

POINT I

THE TRIAL COURT'S JUDGMENT RESCINDING THE ADMINISTRATIVE SUSPENSION OF RESPONDENT'S OPERATING PRIVILEGE WAS PROPER IN THAT IT WAS SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE THAT THE BREATH TESTING OFFICER FAILED TO

CONTINUOUSLY OBSERVE RESPONDENT DURING THE FIFTEEN MINUTES IMMEDIATELY PRECEDING THE TAKING OF A BREATH SAMPLE DURING WHICH TIME RESPONDENT BELCHED.

AUTHORITIES

Carr v. Dir. of Revenue, 95 S.W.3d 121 (Mo. App. W.D. 2002)

Turrell v. Missouri Department of Revenue, 32 S. W. 3d 655 (Mo. App. W. D. 2000)

Dillion v Director of Revenue, 999 S.W. 319 (Mo. App. W.D. 1999)

POINT II

THE TRIAL COURT'S JUDGMENT RESCINDING THE ADMINISTRATIVE SUSPENSION OF RESPONDENT'S OPERATING PRIVILEGE WAS PROPER IN THAT IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THE DATAMASTER SOFTWARE WAS CHANGED BY THE DEPARTMENT OF HEALTH AND SENIOR SERVICES ABSENT COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURES ACT BECAUSE SUCH A

CHANGE IS A RULE WITHIN THE MEANING OF § 536.010(4).

AUTHORITIES

Missouri Health Care Ass'n v. Missouri Dep't of Social Services., 851 S.W.2d 567 (Mo. App. W.D. 1993)

Baugus v. Director of Revenue, 878 S.W.2d 39 (Mo. 1994)

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10 (Mo. 2003)

ARGUMENT

POINT I

THE TRIAL COURT'S JUDGMENT RESCINDING THE ADMINISTRATIVE SUSPENSION OF RESPONDENT'S OPERATING PRIVILEGE WAS PROPER IN THAT IT WAS SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE THAT THE BREATH TESTING OFFICER FAILED TO CONTINUOUSLY OBSERVE RESPONDENT DURING THE FIFTEEN MINUTES IMMEDIATELY PRECEDING THE TAKING OF A BREATH SAMPLE DURING WHICH TIME

RESPONDENT BELCHED.

AUTHORITIES

Carr v. Dir. of Revenue, 95 S.W.3d 121 (Mo. App. W.D. 2002)

Turrell v. Missouri Department of Revenue, 32 S. W. 3d 655 (Mo. App. W. D. 2000)

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Review of the trial court's judgment after a trial de novo is governed by the standards set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc. 1976), *Kimber v. Director of Revenue*, 817 S.W.2d 627, 629 (Mo. App. 1991). The decision of the trial court must be affirmed on appeal unless there is no evidence to support the decision, the decision is against the weight of the evidence, or the trial court erroneously declares or applies the law. An appellate court will accept as true "the evidence supporting the circuit court's judgment, as well as all reasonable inferences drawn from such evidence," and will disregard all contrary evidence and inferences. *Id*. at 629-630. *Dillion v Director of Revenue*, 999 S.W. 319, 321-322 (Mo. App. W.D. 1999). *See also Cessor v. Director of Revenue*, 71 S.W.3d 217, 219 (Mo. App. W.D. 2002). When reviewing a judgment in a driver's revocation case, the evidence and all reasonable inferences drawn from there are viewed in the light most favorable to the judgment, and all evidence and inference to the contrary are disregarded. *Bain v. Wilson*, 69 S.W.3d 117, 120 (Mo. App. W.D. 2002) *citing Callendar v. Director of Revenue*, 44 S.W.3d 866, 868 (Mo. App. W.D. 2001).

In a driver's license revocation proceeding, the trial court is accorded wide discretion

on factual issues and the conclusions that follow. *Hansen v. Director of Revenue*, 22 S. W. 3d 770, 772 (Mo. App. E.D. 2000). "(W)here evidence is presented which, if believed, would support a finding in favor of one party, but contrary or inconsistent evidence is also presented, then it is up to the judge to resolve the factual issues, including determining the credibility of witnesses. So long as its determination is supported by substantial evidence, an appellate court will affirm, regardless of whether it would have reached the same result." *Hampton v. Director of Revenue*, 22 S.W.3d 217, 220 (Mo. App. W.D. 2000) *citing Endsley v. Director of Revenue*, 6 S.W.3d 163, 165 (Mo. App W.D. 1999). When weighing credibility the circuit court is free to accept or to reject all, part, or none of the testimony of any witness. *Hawk v. Director of Revenue*, 943 S.W.2d 18, 20 (Mo. App. S.D. 1997). Conversely, if any part of the witness' testimony can be viewed as inaccurate or inconsistent, "the usual rule attends and we give deference to the trial court in its resolution of all witness credibility questions." *Turrell v. Missouri Department of Revenue*, 32 S.W. 3d 655, 657 (Mo. App. W. D. 2000) *quoting Endsley v. Director of Revenue*, 6 S.W. 3d 153, 161 (Mo. App. 1999) Ordinarily an appellate court gives considerable deference to the trial court's credibility determination. *Mitts. v. Director of Revenue*, 57 S.W. 3d 357, 359 (Mo. App. E.D. 2001).

According to Corporeal Brenion, Mr. Coyle was arrested at 1:05 a.m. [Tr. 88]. Once under arrest, he was placed in the trooper's patrol car. [Tr. 88]. The corporeal then returned to the Coyle vehicle to speak with Mrs. Coyle regarding the vehicle and her ability to drive. Concerned, the corporeal gave her instructions on the use of a portable breath tester and then asked that she provide a sample, which she did. Based upon the results, he told her he would not

let her drive. The corporeal then escorted her back to his car. [Tr. 88-89].

Once she was safely inside, he took the keys to the Coyle vehicle and went back to it. He moved it thirty-five to fifty feet away and then secured it. [Tr. 74]. The corporeal spent approximately five to seven minutes dealing with Mrs. Coyle and the vehicle while Mr. Coyle sat unattended in his patrol car. [Tr. 74, 81].

Later on, before Mr. Coyle was asked to provide an evidentiary breath sample, Corporeal Brenion testified that he had observed Mr. Coyle for the fifteen minutes immediately preceding the taking of his sample. [Tr. 84]. He kept track of the time with his wrist watch. [Tr. 84]. While his watch didn't necessarily correspond with the time on the breath test printout, he did believe that his watch was accurate. [Tr. 86]. For an evidentiary breath test result to be admissible, there must be evidence that the particular unit utilized had been subjected to a maintenance check within the thirty-five day time frame immediately preceding the individual subject test. To satisfy this element in the instant action, the Director called upon Riverside Police Officer Archibald. He had last performed a maintenance check on the Datamaster prior to Mr. Coyles' arrest on October 1. [L. F. 23] At that time he found the unit to be operating within all established limits. [L. F. 23]. He likewise found the time and date to be "satisfactory". [L.F. 23].

The Datamaster breath test ticket represented that Mr. Coyle provided a breath sample at 1:22 a.m., seventeen minutes after his arrest. [L.F. 25]. Thus, although the time on Corporeal Brenion's wrist watch did not necessarily "correspond" with that on the Datamaster, there was no evidence that they differed. Indeed, the uncontradicted evidence established that they were

both accurate.

Coyle testified he and his wife had split a pitcher of beer over several hours. He also testified that beer makes him a little "gassy". [Tr. 76] That is, it makes him belch or burp. It did so throughout the evening of October 7 and the morning hours of October 8. [Tr. 76].

The trial court found:

> Petitioner (Respondent herein) was arrested at 1:05 a.m. and that the breathalyzer was given to the Petitioner at 1:22 a.m. During that 17 minute period the Trooper placed the Petitioner in his patrol car and a few minutes later left him alone, while the Trooper returned to the Petitioner's automobile to speak with the Petitioner's wife. The Trooper then moved the Petitioner's vehicle to another spot in the parking lot so it would be safe and out of harms way. The Trooper returned to the Patrol car a minimum of five minutes. During this time, Petitioner was out of his sight.

[Appendix to Appellant's brief A2-3].

These findings are uncontradicted and consistent with evidence adduced. While the trooper thought he had observed Mr. Coyle for the requisite minimum time frame, the trial court was free to believe otherwise. Such is particularly true where, as here, there was credible evidence contracting such assertions. The Coyles' recollection was substantiated by the time evidence offered by the Director.

The procedures set out in Chapter 577 R.S. Mo. - and the regulations promulgated pursuant to it - serve as a substitute for the common law foundation for the introduction of evidence of analysis for blood alcohol, and their requirements are mandatory. *State v. Regalado*, 806 S. W. 2d 86, 88 (Mo. App. W.D. 1991). Statutes dealing with testing methods necessary to validate results of breathalyzer tests, have equal applicability whether the proceedings are criminal or civil. *Jannett v. King*, 687 S.W. 2d 252, 254 (Mo. App. E.D. 1985).

The significance of the observation period was recently emphasized by this appellate court in *Carr v. Director of Revenue*, 95 S.W. 3d 121 (Mo. App. W.D. 2003).

> It is our belief that the "observation requirement" is critical to determining whether in fact an individual has driven while illegally intoxicated. The results of a breathalyzer test are given much weight, as they should be, in our judicial system. However, in order to insure the - veracity and precision of this testing device does not become undermined, it is imperative for the police to follow minimum administrative guidelines in observing the driver before the test is given. We believe that such a requirement imposes a relatively insignificant administrative burden on the police, and in any event, that its benefits in instilling confidence in the testing results far outweigh any inconvenience.

. . . .

> Make no mistake, applied to our case, we cannot say that the "waiting period" requirements were not in fact observed by the police. *Only the trial court can make that finding of fact. But if, as is evident in our case, such a finding is made, no further evidence need be adduced in order for the trial court to reinstate an individual's driving license on the basis that the driver had rebutted the Director's prima facie case*.

Carr v. Dir. of Revenue, 95 S.W.3d 121, 130 (Mo. App. W.D. 2002). (emphasis added.)

Here the trial court made such a finding, and properly so.

POINT II

THE TRIAL COURT'S JUDGMENT RESCINDING THE ADMINISTRATIVE SUSPENSION OF RESPONDENT'S OPERATING PRIVILEGE WAS PROPER IN THAT IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THE DATAMASTER SOFTWARE WAS CHANGED BY THE DEPARTMENT OF HEALTH AND SENIOR SERVICES ABSENT COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURES ACT BECAUSE SUCH A CHANGE IS A RULE WITHIN THE MEANING OF § 536.010(4).

Missouri Health Care Ass'n v. Missouri Dep't of Social Services., 851 S.W.2d 567 (Mo. App. W.D. 1993).

Baugus v. Director of Revenue, 878 S.W.2d 39 (Mo. 1994)

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10 (Mo. 2003)

The Department of Health and Senior Services is a state agency. It is statutorily charged

with the responsibility of approving "satisfactory techniques, devices, equipment or methods" for determining, by chemical analysis, the alcohol concentration in certain bodily fluids. *§§ 577.020.4* and *577.026.2* R.S.Mo. (2003). As a state agency, the Department must comply with the Administrative Procedures Act when promulgating rules and regulations in fulfillment of this legislative assignment. *§ 192.006* R.S. Mo. (2003). The Administrative Procedures Act defines a rule as a "statement of general applicability that implements, interprets, or presecribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. *§ 536.010(4).*

In recognition of this responsibility, the Department of Health and Senior Services adopted certain rules and regulations governing evidentiary breath testing techniques and equipment. [Tr. 26-27]. *See 19 C.S.R. 25-30*. Included withing this codification was the agency's approval of the Datamaster as an evidentiary breath testing device. *19 C.S.R. 25-30.050.*

In the instant proceeding, Chris Silva testified for the petitioner. She is employed by the department's breath testing section and indicated a familiarity with the Datamaster. [Tr. 9-10]. She acknowledged that the Datamaster had been an approved device since at least the early 1990s. [Tr. 9-10]. Ms. Silva also testified that subsequent to this approval, she requested that certain changes be made to the unit's software. [Tr. 12]. Ms. Silva did not suggest that there were any problems or deficiencies with the Datamaster or the software it utilized prior to her requested change.

According to Ms. Silva, eight revisions and eleven months later, the new software finally

incorporated all of the changes she had requested. [Tr. 18]. This, despite the fact that the software manufacturer had represented to her that all eight tendered revisions would do what she wanted. [Tr. 19, 21].

Ms. Silva confirmed the acceptability of the final program through her own installation and internal department testing of a singe unit in the department's Jefferson City laboratory. [Tr. 18]. There was no outside audit, study or performance evaluation performed. No one other than Ms. Silva attempted to determine the integrated effect, if any, of this change.

Ms. Silva established her own verification protocol. This process was less than that required for the approval of a testing device for use in this state. [Tr. 18]. She felt extensive testing was not warranted. [Tr. 18]. The results of her study were not noticed in any peer review journal nor were they even published. Apparently the department was comfortable in knowing that Ms. Silva was satisfied with the change and it effect on the operational aspects of the Datamaster.

Of equal significance is the process through which this change was distributed throughout the state. When Ms. Silva received a master disk, she burned copies; one was then given to the highway patrol and the other to the safety center in Warrensburg. These entities then either burned more copies or installed the new software from the copy Ms. Silva had provided. [Tr. 23-24]. Neither of the copies she burned were evaluated, tested or otherwise checked. None of the subsequent duplications have been analyzed. [Tr. 24-25]. None of the Datamasters utilizing the change have been examined other than by a standard periodic maintenance check. [Tr. 24-25].

Ms. Silva felt that the changes occasioned through the software modifications did not warrant a rule revision or publication of the change. [Tr. 29].

> Not every generally applicable statement or "announcement" of intent by a state agency is a rule. Implicit in the concept of the word "rule" is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.

Baugus v. Director of Revenue, 878 S.W.2d 39, 42 (Mo. 1994) citing Bonfield, State Administrative Rule Making, §§ 3.3.1 (1986).

> Stated differently, rulemaking "affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it." Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise sec.6.1 at 228 (3d. ed. 1994); Bonfield, supra sec.3.1, at 60, quoting J. Dickinson, Administrative Justice and the Supremacy of Law 2 (1927). In distinguishing between rules and general statements of policy, it has been said that an agency statement is a rule "... if it purports in and of itself to create certain rights and adversely affects or serves by its own effect to create rights or to require compliance, or otherwise to have the direct and consistent effect of law." 73 C.J.S. *supra* sec.87, p. 578. Stated more simply, as explained by

> one federal court, "a properly adopted substantive rule establishes a standard of conduct which has the force of law.

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 23 (Mo. 2003) *quoting*

Pacific Gas & Electric Company v. Federal Power Commission, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C.Cir. 1974).

Those who operate a motor vehicle upon the public roadways of this state implicitly agree to submit to a chemical test when arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition. § 577.020 R.S.Mo. The results of such testing can lead to administrative license sanctions (§ 302.500 *et seq*.) and criminal prosecution (§§ 577.010, 577.020, 577.023). Certainly the department's declaration impacts the substantive or procedural rights of many members of the traveling public. The impact is more than potential and greater than slight.

> (T)he test of whether or not an action involves an agency rule or an agency decision is whether or not the action seeks a declaration concerning a statement of policy or interpretation of law of future effect which acts on unnamed and unspecified persons or facts, or whether the action involves specific facts and named or specified persons or facts. In the former situation the action involves an agency rule, in the latter an agency decision.

Missouri Health Care Ass'n v. Missouri Dep't of Social Services., 851 S.W.2d 567, 570 (Mo. App. W.D. 1993).

The Department of Health and Senior Services through Ms. Silva represents that the changes have no effect on the chemical testing process. {Tr. 29]. As a result, the department apparently determined that no rule making process need be invoked. [Tr. 29]. Such a misrepresentation is nothing more than a self-serving declaration barren of authoritative analysis and investigation. To avoid such proclamations the General Assembly directs:

> Each state agency shall adopt procedures by which it will determine whether a rule is necessary to carry out the purposes of the statute authorizing the rule. Such criteria and rule making shall be based upon reasonably available empirical data and shall include an assessment of the effectiveness and the cost of rules both to the state and to any private or public person or entity affected by such rules.

§ 536.016.2 R.S. Mo.

What procedure has the Department of Health and Senior Services adopted to make its determination that a rule was or was not necessary in this case? What criteria was set forth? Was the data created by Ms. Silva's study really "empirical data?" Was there an assessment of the potential cost and the potential effectiveness?

The General Assembly did not define the term "satisfactory" as set forth in §§ 577.020 and 577.026 R.S.Mo. Nor is there a legislative history to assist the Department in fulfilling this statutory mandate. But the legislature did specifically require that the actions of the Department be governed by the administrative procedures act. Such directive enhances the opportunity and likelihood that any proposed change would be independently critiqued through public comment. [Tr. 28].

In summary, the Department of Health and Senior Services sought and implemented changes to software for an evidentiary breath testing device which had been approved in its former state for more than a decade. The department unilaterally determined though its in house testing that the changes had no effect on the breath testing analytical process. The department unilaterally determined that the Administrative Procedures Act's rule making process need not be invoked. It made such a determination without first having established the protocol and criteria necessary to ascertain when a rule is not required. It made such a determination without first having considered any empirical study as to its overall effects. The department's conclusion was premised entirely upon a single unpublished study by a sole state employee who admittedly did not subject the modified unit to a complete and thorough testing.

The omissions of the Department of Health and Senior Services demonstrates utter contempt for the legislative responsibilities imposed. Absent compliance by the Department with rudimentary statutory responsibilities and safeguards, the trial court properly rejected the results of the evidentiary breath test administered herein.

CONCLUSION

The trial court properly set aside the Director's proposed administrative sanction of Respondent's driving privilege in that the Director failed to show that the Department of Health and Senior Services utilization of new software was done in accordance with the requirements of the Administrative Procedures Act. Or in the alternative, the trial court properly found that the observation period was not properly complied with.

Respondent thus prays this Court affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE AND SERVICE

I hereby certify:

1. The attached brief (a) includes the information required by Rule 55.03 and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, the signature block and this certification, as determined by WordPerfect 9.0 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on this 29th day of May, 2004, to James A. Chenault, III, Special Assistant Attorney General, Missouri Department of Revenue, P. O. Box 475, Jefferson City, MO 65105-0475, Attorney for Appellant.

_____
Jeffrey S. Eastman